No. 87 555

In the Supreme Court of the United States

October Term, 1987

THE STATE OF OHIO,
Petitioner,

vs.

BILLY ROGERS, AKA RAYMOND LEE HUDSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The Supreme Court of Ohio should not have retroactively applied *Wainwright v. Greenfield,* 474 U.S. ..... (1986) to the present case.

II. The Supreme Court of Ohio misapplied the harmless error doctrine as set forth in *United States v. Hasting,* 461 U.S. 499 (1983).

III. *Wainwright v. Greenfield* should not apply to a fact situation when defense counsel elicits testimony that an accused asserted his Miranda rights and failed to object to the subsequent use of that information during trial.

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The State of Ohio, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in this matter on August 12, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio reversing the conviction and death sentence of the Respondent is reported at 32 Ohio St. 3d 70 (1987). The opinion is reproduced in the Appendix to this Petition at pages A1-A10.

The opinions of the Supreme Court of Ohio affirming the conviction and death sentence of the Respondent are reported at 28 Ohio St. 3d 427 (1986) and 17 Ohio St.

3d 174 (1985). These are reported in the Appendix at pages A12-A29 and A32-A58.

The opinion of the Court of Appeals of Ohio (Sixth District) is not reported but is reproduced in the Appendix at pages A61-A122.

The opinion of the Court of Common Pleas of Lucas County is not reported but is reproduced in the Appendix at pages A125-A146.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered judgment reversing a conviction and setting aside a death sentence on August 12, 1987.

Jurisdiction of the Court is invoked under Title 28, Section 1257 United States Code.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The facts of this brutal kidnap-rape-murder are set forth in *State v. Rogers,* 17 Ohio St. 3d 174-175 (1985). The Respondent was arrested after the body of a seven-year-old was found in his bedroom closet. An officer gave him his "Miranda" rights but he was not questioned.

He was then taken to police headquarters where he was interviewed by Detective Arthur Marx. Detective Marx did not mention Rogers' assertion of the right to counsel on direct examination. On cross-examination, defense counsel deliberately elicited testimony from the detective regarding this assertion of wanting counsel and even went through Rogers' actions in attempting to contact an attorney. Detective Marx even made sure counsel wanted him to testify about this subject.

> "(Cross examination of Toledo Police Officer Marx by Mr. Callahan, counsel for respondent.)
>
> Q. Officer Marx, Mr. Yavorcik in his Direct Examination of you earlier said that you were the chief investigating officer of this case; is that the correct term for your function in this case?
>
> A. Yes, sir.
>
> Q. Thank you. Now, when you talked with Billy Rogers on the morning of November 15, 1981, did you go beyond the questions that you testified that you asked him on Direct Examination?
>
> A. Yes.
>
> Q. I believe they extended from his name and address through what his education was?

A. Yes, I did.

Q. You went further than that?

A. I did.

Q. What else did you ask him?

A. *Are you referring to the rights?*

Q. Yes.

A. Yes, I did.

Q. When did you give him his rights?

A. At approximately 2:00 a.m. I asked Mr. Rogers to read aloud to me from the waiver of rights form.

Q. And did he read it to you?

A. Yes, he did.

Q. Did he have difficulty reading it?

A. Not to the degree that it was noticeable that I took a note indicating so.

Q. But you were able to understand what he said?

A. That's correct.

Q. Now, that was the second time he had been given his rights that evening? Do you know that the officers at the scene gave him his rights?

A. I did not know that.

Q. Then you asked him questions about the incident of the evening, is that correct?

A. Yes.

Q. What did he tell you?

A. I asked Mr. Rogers to tell me why he had been brought to the police station. His comment was that the officers brought him to the station. He continued and he stated that his landlord—he didn't name him. He stated the landlord came to the door, and he, Mr. Rogers, let the landlord in. Two or three minutes later the officers came. He didn't know that anyone was in his apartment and he didn't know why he was brought to the Safety Building. At that point is when I informed him that he was brought to the Safety Building because the little girl's body had been found in his closet. That was—it was at that point in time that we went through the Miranda rights.

Q. *And what did he say after you had given him his Miranda rights?*

A. His comment to me after reading the third paragraph, and I would quote, '*I would like talk to an attorney first.*'

Q. That's what he said?

A. Yes, sir.

Q. Of course that was his right to do that, was it not?

A. That's correct.

Q. And you respected that?

A. That's correct.

There obviously was no objection to this testimony nor were there objections when the evidence was subsequently utilized with witnesses or commented during closing. There also was an abandonment of the issue until counsel

raised it upon remand from this Court dealing with a totally separate issue. The Ohio Supreme Court initially ruled this was res judicata but later sua sponte agreed to reconsider the issue. On August 12, 1987, the Ohio Supreme Court reversed the conviction and set aside the death penalty based upon *Wainwright v. Greenfield,* 474 U.S. ..... (1986).

ARGUMENT FOR ALLOWANCE OF WRIT

I. THE SUPREME COURT OF OHIO SHOULD NOT HAVE RETROACTIVELY APPLIED WAINWRIGHT v. GREENFIELD TO THE PRESENT CASE.

The present case before the Court deals with a homicide which occurred on November 14, 1981. The jury convicted the Respondent on September 22, 1982 and recommended the death penalty on September 29, 1982. On October 29, 1982, the trial judge imposed the sentence. On March 9, 1984, the Sixth District Court of Appeals upheld the conviction and on June 5, 1985 the Ohio Supreme Court upheld the conviction. On December 2, 1985 this Court remanded the case to the Ohio Supreme Court for consideration of *Caldwell v. Mississippi,* 472 U.S. 320 (1985), and on December 30, 1986 the Ohio Supreme Court reaffirmed the conviction.

On March 16, 1987, the Ohio Supreme Court sua sponte agreed to reconsider the case based upon *Wainwright v. Greenfield* which had been decided on January 14, 1986. The Respondent had not raised this issue in the Ohio Supreme Court on the initial appeal. The issue presented by the most recent Ohio decision questions whether *Wainwright, supra* should be given prospective or retroactive application.

The Petitioner would respectfully represent that the Ohio Supreme Court improperly applied *Wainwright, supra* retroactively to the present case. Since 1965, the United States Supreme Court's announcement of a constitutional rule in the realm of criminal procedure has frequently been followed by a separate decision explaining whether the rule applies to past, pending and future cases. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975).

In *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), this Court applied the Linkletter test to hold that the Fifth Amendment rule of *Griffin v. California*, 380 U.S. 609 (1965) which barred comment on the Defendant's failure to testify to be nonretroactive. This case is a comment on the Defendant's silence and should not be applied retroactively.

Recently in *United States v. Johnson*, ... U.S. ..... (1982) this Court attempted to narrow three categories of cases dealing with the retroactivity issue. First, were cases that applied well settled precedents to new and different factual situations. These cases were applied because the later decision did not alter the rule in any material way.

Second, in cases where this Court has expressly declared a rule of criminal procedure to be "a clear break with the past," *Desist v. United States*, 394 U.S. 244, 248 (1969), it invariably has gone on to find the new principle nonretroactive.

Third, this Court has recognized full retroactivity if the trial court lacked authority to convict or punish a criminal defendant in the first place.

The ruling in *Wainwright, supra,* did not simply apply settled precedent to a new set of facts but rather engaged in an entirely new and unanticipated principle of law. Therefore, the ruling in *Wainwright, supra* should not have been applied to the present case.

II. THE SUPREME COURT OF OHIO MISAPPLIED THE HARMLESS ERROR DOCTRINE AS SET FORTH IN UNITED STATES v. HASTING, 461 U.S. 499 (1983).

The Ohio Supreme Court in *State v. Zimmerman,* 18 Ohio St. 3d 43 (1983) held that in determining whether a prosecutor's reference to an accused's silence requires reversal, courts must apply the "harmless error" doctrine. This followed this Court's holding in *United States v. Hasting,* 461 U.S. 499 (1983).

As Chief Justice Rehnquist noted in the concurring opinion in *Wainwright v. Greenfield*:

> "I think an important factor apparently not considered by the Court of Appeals was that the testimony on which the summation was based had already come in without objection. It was there for the jury to consider on its own regardless of whether the prosecutor ever mentioned it. This fact, together with the brevity of the prosecutor's improper comment, at least suggests that the error was harmless beyond a reasonable doubt. See *Cupp v. Naughten,* 414 U.S. 141 (1973); *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). As the Court points out, however, *ante,* at 640-641, n. 13, the Attorney General has not contested the Court of Appeals' conclusion that any error was not harmless. Accordingly, I concur in the result." 106 S. Ct. at 644.

In the present case, counsel for the Respondent sought to elicit the responses to the Miranda warnings including his right to silence and his request for counsel. *Ohio v. Rogers,* 32 Ohio St. 3d 70, 71 (1987) (Appendix A4). The Ohio Supreme Court reversed the conviction based upon *Wainwright v. Greenfield,* 474 U.S. ..... (1986) relying upon *Doyle v. Ohio,* 426 U.S. 610 (1976).

In the present case, the State did not use "silence" as set forth in *Doyle, supra* against him at trial but rather the request for counsel. The reliance upon *Doyle, supra* and the "plain error" analysis was misplaced. The Ohio Supreme Court should have applied the "harmless error" doctrine as set forth in *Chapman v. California,* 386 U.S. 18 (1967) and *United States v. Hasting,* 461 U.S. 499 (1983).

An analysis of the "harmless error" doctrine should begin with this Court's holding in *Griffin v. California,* 380 U.S. 609 (1965). The Court held that the constitutional provision permitting prosecutorial comment on the failure of the accused to testify violated the Fifth Amendment.

However, soon after *Griffin, supra,* this Court decided *Chapman v. California,* 386 U.S. 18 (1967) which involved prosecutorial comment on the Defendant's failure to testify in a trial conducted before *Griffin, supra* was decided. This Court in *Chapman, supra,* rejected a per se rule and adopted a "harmless error" rule based upon the entire record.

In examining this rule, the *Chapman, supra* Court stated:

> "All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside con-

> victions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. *We conclude that there may be some constitutional error which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless,* not requiring automatic reversal of the conviction." 386 U.S., at 22.

Since *Chapman, supra,* as followed in *Hasting, supra,* this Court has consistently made clear to the reviewing courts that their duty was to consider the whole trial record and to ignore errors that are harmless, including most constitutional violations. *Brown v. United States,* 411 U.S. 223, 230 (1973); *Harrington v. California,* 395 U.S. 250 (1969); *Milton v. Wainwright,* 407 U.S. 371 (1972).

The State submits that a guilty verdict was compelled by the overwhelming evidence of guilt and the total breakdown of Respondent's insanity defense. The Ohio Supreme Court looked to a few isolated sentences in 56 pages of transcribed argument by the prosecutors. They neglected all of the damning evidence which caused the insanity plea to be rejected. Such as:

> Rogers' luring the victim to his apartment after performing magic tricks for children on the sidewalk.
>
> Rogers' waiting until all other children were gone before taking her upstairs to his apartment.
>
> Rogers' taking the time to tie a piece of rope to a necktie (rather than impulsively grabbing the first item he could find) to assist him in strangling the victim.

Rogers' placing vaseline on the victim's genital area.

Rogers' deliberate attempt to redress Lisa Bates after killing her and hiding the girl's body.

Rogers' admissions to a cellmate that he wanted to dump the body in an alley after it got dark.

When confronted with these facts, defense psychiatrist, Dr. Gerd Leopoldt, actually changed his opinion on the witness stand during cross-examination (See T. 1763, 1765, 1773-1777, 1783). Even on direct examination Dr. Leopoldt stated that it was his opinion that Rogers intended to sexually abuse the girl (T. 1739). Dr. Charlene Cassell, a psychologist, and Dr. Thomas Sherman, a psychiatrist, both testified in rebuttal that the Appellant was legally sane at the time of the offense (T. 1876 and 1949). Furthermore, the State produced several lay witnesses who testified to Billy Rogers' ability to function in society (See trial court's opinion for summary of the evidence).

In the face of this overwhelming evidence, to say that a jury would have found Rogers not guilty by reason of insanity, but for the two remarks in closing argument is simply ridiculous.

Based upon the introduction of the claimed error by the Respondent and the overwhelming evidence of guilt as well as sanity, the Ohio Supreme Court should have been satisfied that the error relied upon was harmless.

III. WAINWRIGHT v. GREENFIELD SHOULD NOT APPLY TO A FACT SITUATION WHEN DEFENSE COUNSEL ELICITS TESTIMONY THAT AN ACCUSED ASSERTED HIS MIRANDA RIGHTS AND FAILED TO OBJECT TO THE SUBSEQUENT USE OF THE INFORMATION DURING TRIAL.

This case was originally decided by the Ohio Supreme Court on June 5, 1985 (Appendix A32-A58). *State v. Rogers,* 17 Ohio St. 3d 174 (1985). This Court then remanded the case in light of *Caldwell v. Mississippi* (Appendix A30). The Ohio Supreme Court then expanded the scope of review to include the *Wainwright* issue. However, on December 30, 1986 the Ohio Supreme Court decided the *Caldwell* issue. *State v. Rogers,* 28 Ohio St. 3d 427 (1986) (Appendix A12-A29). However, at that time the Ohio Supreme Court decided that the Respondent had abandoned the *Wainwright* issue and the doctrine of res judicata foreclosed consideration on that issue. Justice Holmes writing for the majority said:

> After examining the record in the present case, it becomes apparent that appellant does not stand in the asserted "identical posture" as the appellant in *Buell.* Although appellant did fail to object at the trial level, it appeared to be a conscious result of its own decision to initially broach the subjects now asserted to have been erroneously broached. However, the issue was firmly raised before the Court of Appeals for Lucas County in appellant's proposition of law number twenty-six. That court determined that any possible error was self-induced.

Proposition of Law Number Twenty-Six (Appendix A112) in the State Court of Appeals questioned the ad-

missibility of the evidence in question and not the use of the evidence. The entire issue was abandoned to the Ohio Supreme Court and the subsequent Writ of Certiorari to this Court. It was only upon remand that the Respondent raised this issue for the first time. The Ohio Supreme Court violated its own rule set forth in *State v Williams,* 6 Ohio St. 3d 281 (1983) which said that the scope of review should be limited upon remand from the United States Supreme Court to the specific issue of the remand.

It was procedurally at this stage that the Respondent first questioned the use of this evidence at trial. It is well settled in Ohio as set forth in *State v. Black,* 54 Ohio St. 2d 304 (1978) that:

> "It is an accepted rule of law in Ohio that an appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Barker,* 53 Ohio St. 2d 135, (1978); *State v. Gordon,* 28 Ohio St. 2d 45, 57 (1971)."

Thus, it appears that this issue was waived at trial and abandoned upon appeal.

Further, a major distinction should be made between the case at bar and *Greenfield.* In both *Greenfield* and *Doyle v. Ohio,* 426 U.S. 610 (1976) it was the use of defendant's post-arrest *silence* which triggered the due process violation. In the case at bar the issue is not silence but Rogers' request for a lawyer. In *Sullie v. Duckworth,* 689 F.2d 128 (7th Cir. 1982) the United States Court of Appeals noted the distinction between the two rights in holding that an accused's request for counsel was admissible

in support of the state's contention that he was legally sane at the time of the offense—(especially since the request came "only 30 hours after the crime".) 689 F.2d at 131. In the case at bar, Rogers' request for counsel came approximately 8 hours after the offense.

Often in prosecutorial argument cases, courts have refused to reverse a conviction because the comments were "an invited response" due to defense counsel's argument. *Lawn v. United States,* 355 U.S. 339 (1958); *United States v. Young,* 105 S. Ct. 1038 (1985). The evidence itself (which might otherwise be inadmissible) may be allowed when defense counsel's questioning opens the door. *Walder v. United States,* 347 U.S. 62 (1953). Even evidence and arguments regarding post-arrest silence when it is offered to rebut a defense claim that police failed to fully investigate and get the accused's side of the story before chasing him. *State v. Bell,* 446 So. 2d 1191 (La. 1984).

One additional argument which was not presented in *Wainwright* deals with the defense of insanity. In Ohio, the defendant has the burden of proving insanity by a preponderance of the evidence. This was recently approved and acknowledged in *Martin v. Ohio,* 480 U.S. ..... (1987).

Historically even if not recognized legally, the Defendant may present this defense through experts who base their opinions to a large degree upon statements of the accused. This in any other respect is blatant hearsay. However, it appears to be recognized.

When this defense is raised, what the Defendant has said or his actions in close proximity to the crime is important to the experts. The failure to disclose this information to the experts should be admissible for im-

peachment but in this case the evidence was previously admitted. Therefore, the use of the assertion of the right to counsel is an affirmative act to be utilized by experts in the affirmative defense as raised by the Defendant. This distinction must be addressed in a full discussion of the *Wainwright* holding.

Wherefore, the State of Ohio believes that significant differences exist between the present case and the *Wainwright* decision. Therefore, based upon these distinctions, the Ohio Supreme Court improperly applied *Wainwright*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the sentence of death reinstated.

Respectfully submitted,

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